Office-Supreme Court, U.S.
FILED
MAR 15 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 987

THE MOTOR CONVOY, INC. and NATIONAL TRUCKING COMPANY, *Appellants*

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal From the United States District Court for the Northern District of Georgia, Atlanta Division

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the final order and judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, entered on November 24, 1964, denying the injunction and dismissing the Complaint of appellants as plaintiffs in the Court below which sought to set aside, annul and declare void certain orders of the Interstate Commerce

Commission. Appellants respectfully submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the Northern District of Georgia has been reported at 235 F. Supp. 250. The opinion, as amended, order, and judgment of the District Court is set forth in Appendix "A" attached hereto. There was no opinion of the Interstate Commerce Commission precedent to its orders.

JURISDICTION

Appellants, as plaintiffs, brought this action under Title 28 of the United States Code, Sections 1336, 1398, 2284 and 2321 through 2325; Title 5, United States Code, Sections 1007 and 1009; and Title 49, United States Code, Sections 17(9) and 305(g), to enjoin, annul and set aside orders of the Interstate Commerce Commission and a Certificate of Public Convenience and Necessity issued by that Commission. The initial opinion of the District Court was entered on October 2, 1964. By order of the District Court entered November 24, 1964, its initial opinion was amended and motion of plaintiffs for rehearing, reargument and reconsideration was denied. The final judgment of the District Court was entered on November 24, 1964. Notice of appeal was filed in the District Court on January 14, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253, § 2101(b) and §§ 2321-2325, inclusive. This Court has jurisdiction: *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60.

QUESTIONS PRESENTED

(1) Whether there was substantial competent evidence under permissible standards to support a determination of public convenience and necessity and fitness of the applicant by the Interstate Commerce Commission, as required by Section 207(a) of the Interstate Commerce Act (49 U.S.C. § 307(a)) for the extension of the motor carrier operating rights of Dixie Transport Company, where no shipper showed any present or future need for the extended authority and where there were qualified certificated carriers engaged in performing the service covered by the extension?

(2) Whether the District Court erred in holding that where a motor common carrier had held a certificate authorizing transportation of automobiles from a point of manufacture to a destination territory in all-motor carrier service, that a further finding of public convenience and necessity was not essential under Section 207(a) of the Interstate Commerce Act (49 U.S.C. § 307(a)) to an extension of such certificate to add new authority to cover transportation of automobiles in secondary movements from a railhead in the destination states to ultimate consignee, where adequate motor carrier service was already available and being utilized for the latter service and no shipper made any complaint of inadequate service or showed any present or future need for the extended authority?

(3) Whether under Section 8 of the Administrative Procedure Act (5 U.S.C. § 1007(b)) the Interstate Commerce Commission orders containing no reference to material issues of fact and law and no reasons or basis for its findings and conclusions, are therefore

unlawful and the Commission has failed to accord due process of law.

STATEMENT OF THE CASE

Appellant, The Motor Convoy, Inc., is a Georgia Corporation, being a motor common carrier authorized by the Interstate Commerce Commission to transport automobiles, in truckaway service, in secondary movements, between points in the States of Georgia and Florida, and between points in the State of Georgia, and between points in the State of Florida, in interstate or foreign commerce, as pertinent to this case.

Appellant, National Trucking Company, is a Florida Corporation, being a motor common carrier authorized by the Interstate Commerce Commission to transport automobiles, in truckaway service, in secondary move ments, between all points in Florida and between points in Florida and that part of Georgia on and South of U. S. Highway 78, in interstate or foreign commerce, as pertinent to this case.

Dixie Transport Company has held since October 26, 1939, a certificate from the Commission to operate as a motor common carrier transporting automobiles and trucks, in truckaway service, from Detroit, Michigan among other points, to points in the States of Florida and Georgia (except certain Georgia counties), known as initial authority.

The Interstate Commerce Commission found in *National Auto. Transporters Ass'n. — Declaratory Order,* 91 MCC 395, at page 413, that where a railroad originates traffic at Detroit, Michigan, as pertinent here, for transportation in rail service to a point in the destination area, Atlanta, Georgia, as an example

as pertinent here, a motor common carrier holding authority only from the plant site at Detroit, cannot pick up the traffic from the point of rail unloading but must possess appropriate "secondary" authority from the rail unloading point for delivery to ultimate destination.

In 1961, the Chrysler Corporation changed the routing of its automobile traffic from Detroit, Michigan to points in Georgia and Florida, shifting from all-motor carrier service to movement in rail multi-level cars to such railheads as Atlanta, Georgia and Jacksonville and Miami, Florida then in motor common carrier service beyond the railhead to the ultimate receiver.

After having filed and processed two applications before the Interstate Commerce Commission for secondary authority from railheads to ultimate receivers in the involved area, both of which were denied by the Commission after full hearing,[1] Dixie Transport Company filed a petition with the Interstate Commerce Commission on January 17, 1963, asking that its certificate be modified so as to grant it the appropriate authority to handle traffic from the railheads to ultimate destinations in Georgia (except certain counties) and Florida.

The petition of Dixie Transport was pursuant to a suggested procedure of the Commission in *National Auto. Transporters Ass'n., Declaratory Order, supra.* The Commission stated in its suggested procedure

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[1] *Docket No. MC-88300 (Sub-No. 23), Dixie Transport Company Extension—Florida,* decided April 18, 1961, not reported in full; and *Docket No. MC-88300 (Sub-No. 27), Dixie Transport Company Extension—Florida,* decided January 22, 1963, not reported in full.

that such a petition would be considered in the same light as an application filed under Section 207(a) of the Act (91 MCC 415).

The Interstate Commerce Commission granted the petition, without oral hearing and without shipper testimony, and issued a new certificate to Dixie Transport Company encompassing the authority which it had held since 1939, and adding thereto the authority to transport Chrysler automobiles from Atlanta, Georgia and Jacksonville and Miami, Florida to points in Florida and Georgia (except certain counties), in secondary movements, in truckaway service, restricted to traffic originating in rail service at Detroit, Michigan.

Appellants are carriers, among others, who hold operating authority and who have participated in the Chrysler traffic since 1961, from these railheads to this destination territory. Appellants brought this action to set aside the action of the Interstate Commerce Commission, after having exhausted their administrative remedies.

The case was heard on the record (pleadings actually) before the Commission and now before this Court. The District Court as especially constituted pursuant to 28 U.S.C. § 2325 and § 2284 was comprised of the Honorable Griffin B. Bell, Circuit Judge, Frank A. Hooper and Lewis R. Morgan, District Judges.

The District Court's opinion (Appendix A) indicated that in deciding adversely to appellants it:

(1) Considered the rights of Dixie Transport Company to transport automobiles from the plant at

Detroit, Michigan to points in the destination territory as encompassing some inherent privilege on Dixie's part to *follow the traffic* upon shipper's diversion to railroad transportation and continue to handle this traffic from railheads in the destination area without regard to the public convenience and necessity and irrespective of availability of adequate common carrier service from the railheads now meeting shipper's complete needs.

(2) Avoided any analysis of whether the requirements of Section 207(a) of the Interstate Commerce Act (49 U.S.C. § 307(a)) have been complied with by the Commission in granting the new certificate to Dixie Transport Company.

(3) Avoided any consideration of the manner the shipper has obtained deliveries from railheads since 1961 when diversion occurred to railroads at the plant nor the adequacy of that present service to meet the shipper's complete needs.

(4) Avoided any consideration of Dixie's two previous attempts and failures to prove public convenience and necessity for a similar service from these railroads.

(5) Avoided any consideration of whether the Commission's orders and procedure accorded due process of law under the Administrative Procedure Act. (5 U.S.C. § 1007).

On this appeal appellants contend that as a matter of law Dixie's prior authority to transport automobiles from the plant in Michigan forms no lawful basis in and of itself upon which the Commission could grant new authority to Dixie to transport automobiles from

railheads following independent movement by railroads; that proof of public convenience and necessity under Section 207(a) of the Interstate Commerce Act (49 U.S.C. § 307(a)) upon findings of fact supported by substantial probative evidence of record under minimum standards should have been required prior to the grant of the new certificate; and that failing in such, the Commission's action and the opinion of the District Court are clearly erroneous and wrong.

QUESTIONS ARE SUBSTANTIAL

This appeal presents questions of very substantial importance in the administration of Section 207(a) of the Interstate Commerce Act (49 U.S.C. § 307(a)) upon which the Supreme Court has not had the occasion to make any definitive determination and which are so substantial as to require plenary consideration by the Court. The paramount question of greatest importance relates to whether the Interstate Commerce Commission may lawfully devise and apply as the *sole criteria* of public convenience and necessity under said section a loss of business by a motor carrier resulting from a change in the method of distribution by a shipper; and whether, in one full sweep, the ICC may abandon the connotations of the nouns in the phrase "public convenience and necessity" which have evolved from over a half-century experience of government in the regulation of transportation.

While Congress has not specifically written into Section 207 of the Act each and every criteria which the Commission must consider in applying the statutory standards of public convenience and necessity, when it added the Motor Carrier Act to the Interstate Commerce Act in 1935, it chose the same words to state

conditions for new motor lines which had been employed for similar purposes for railroads in the same act since the Transportation Act of 1920, § 402(18) and (20), 41 Stat. 477. Such use indicated a continuation of the administrative and judicial interpretations of the language. *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60. Now, the substantial question presented to the Supreme Court by this appeal is whether the Interstate Commerce Commission has exceeded its authority, ignored the mandate of Congress, and actually usurped the powers of Congress, by granting a certificate of public convenience and necessity upon a *sole criteria* which has no relation to the statutory standard of whether the proposed operations will be responsive to a public need and serve the public convenience and necessity.

The question is substantial and deserving of plenary consideration by the Supreme Court because of its implications far beyond the sphere of the immediate operations of the carriers here directly involved. While the question is of vast importance directly to the appellants herein insofar as their rights under the Act are concerned and thus deserving of the Court's plenary consideration on that basis alone, with broader scope, the question reaches right to the heart of how far the Commission may go in devising criteria, no matter how arbitrary, in administering Section 207 of the Interstate Commerce Act.

There is presented to the Court here a situation wherein the Commission twice found, after public hearing and full and complete procedure and application of the statutory standards, that the public convenience and necessity did not require operation by Dixie Transport Company in transporting ex-rail

traffic from railheads in Georgia and Florida to ultimate receivers in those states.[2] Although having twice been unable to find that the public convenience and necessity required such operation by applicant, the Commission nevertheless proceeded upon the mere petition of Dixie, without any public support whatever, to amend that carrier's certificate so as to grant new operating authority.

In so doing, the Commission issued no opinions or decisions including findings and conclusions, or the reasons or basis therefor, upon the material issues of fact, law or discretion presented. Thus, there is also presented to the Supreme Court a second and related substantial question as to whether the orders of the Commission are contrary to the provisions of the Administrative Procedure Act (5 U.S.C. § 1001, et seq.) and decisions of the Courts thereunder as not supported by adequate findings and conclusions, or the reasons or basis therefor, upon the material issues of fact and law.

While it cannot be determined directly from the Commission's orders the reasons or basis for its findings and conclusions upon the material issues of fact and law, a glance at the petition of Dixie Transport Company shows that the Commission could only have based its grant of authority to Dixie *solely* on the assertion of that carrier that it had some three years past participated in Chrysler automobile traffic from the manufacturing point of Detroit, Michigan to points in Georgia and Florida.

Unfortunately, the District Court did not come to grips with the real issue of whether the statutory

[2] Ibid., page 5.

standards had been met by the Commission. The District Court merely stated the misconception "Dixie only sought the right to permit railroads to do a part of its hauling, to-wit, from Michigan to Atlanta and Jacksonville, permitting Dixie to transport the automobiles the rest of the way." (Page 7, District Court Opinion, Appendix A). Its misconception of the factual and legal situation resulted in its conclusion that "the need for the transportation by Dixie had previously been established and Dixie had already been supplying that need, and continued to supply that need just as before with the exception of the substitution of rail carriage in lieu of motor carriage for part of the way." (Same page). The factual misconception is in that there is no *substitution* of rail carriage in lieu of motor carriage for part of the way; but rather there is an independent rail movement prior to the motor carriage. This independent rail carriage has been prevalent since 1961 and existing motor carriers with appropriate certificates have handled the traffic ex-rail since 1961.

That there was a misconception by the District Court of the factual and legal situation is borne out by the fact that it ordered page 5 of its original opinion stricken and substituted in lieu thereof a partial correction on motion of these appellants; yet, it did not go far enough to correct the rest of its opinion to comport with the true factual and legal situation.

It is apparent that the District Court conceived Dixie's rights to operate from Detroit to Georgia and Florida in a sense as if the larger rights from Detroit to Georgia and Florida encompassed the lesser right to operate from Atlanta, Jacksonville and Miami to

Georgia and Florida. Such conception is, of course, so grossly wrong as to be obvious. The interpretation of the Interstate Commerce Commission itself in *National Auto. Transporters Ass'n. — Declaratory Order,* supra, squarely refutes this conception of the District Court. The point here is that because of this misconception the District Court never reached the substantial questions of law in this case.

The Question Dealt With By a Lower Court

The question presented by this appeal is virtually identical to the so-called "follow the traffic" doctrine which the Commission and a lower Court have had occasion to deal with but which the Supreme Court has never considered. The "follow the traffic" doctrine has been squarely rejected as a sole criteria for public convenience and necessity by both the Commission and a lower court in other cases. This case now brings the question to the Supreme Court.

In its simplest form, the "follow the traffic" doctrine proposes that if a motor carrier is serving a shipper at its plant at point A, and the shipper then moves its production to point B (which the carrier cannot serve under its certificate), then irrespective of the adequacy of service by other carriers holding authority to service point B, the original carrier should be granted a certificate also to serve point B in order to avoid the economic impact of the loss of its business at point A. For many years this doctrine was considered by the Commission itself until finally it was squarely rejected as a basis for proof of public convenience and necessity and this rejection of the Commission was affirmed by the District Court, New Jersey, in *Smith & Soloman Trucking Co.* v. *United States,*

120 F. Supp. 277. A brief review of the Commission's rejection of this doctrine and the decision of the District Court for New Jersey thereon is essential at this point to place the question in perspective and show the parallel.

The Commission itself in *Smith & Soloman Trucking Co., Extension,* 61 MCC 748, discussed very succinctly the fallacy of the "follow the traffic" doctrine and we quote very briefly certain pertinent excerpts here from pages 752-753:

> ". . . the grant of authority on a mere showing of loss of traffic without proof of lack of adequate existing service in the new location would be contrary to law and to sound reasoning."
>
> ". . . we are restricted by the Act to the issuance of authority only where the proposed service is required by the public convenience and necessity."
>
> "There is one other aspect of this type of case which requires consideration. The declared transportation policy requires us to foster sound economic conditions in transportation. We are required, therefore, to consider among other things the effect of the injection of a new carrier, without proof of public need, on the existing competitive situation in the considered territory."
>
> "If motor common carriers in a given area are affording satisfactory service for the public, they should not be made to suffer by the entry of a new carrier, which in the first instance, is seeking to follow a particular shipper."

Further, we quote very briefly here from the decision of the District Court for New Jersey, supra:

> "The chief concern of the Commission, and rightly so, was to determine whether public convenience

and necessity required the granting of this application. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65; *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241. This is the primary test under the statute and unless the application qualified under that test the Commission had no authority to allow it."

"The National Transportation Policy which the Commission had very much in mind and which is of vital importance in any decision on the instant title of transportation problem does make it mandatory on the Commission, as the latter states: 'to foster sound economic conditions in transportation.' By reason of that policy itself the Commission must carefully weigh the entire relevant situation."

These holdings of the Commission and the District Court never reached the Supreme Court. The issue is here presented to the Supreme Court as to whether the principles in the *Smith & Soloman* case are correct; and if those principles be correct, whether those principles are not binding on the Commission.

This appeal presents to the Supreme Court a variation of the facts, but not the theory. As we have shown in the statement of this case, supra, the factual situation presented here is that Dixie Transport Company previously held authority to transport automobiles from Detroit, Michigan to points in Georgia and Florida; and until 1961, it had participated in all-motor carrier movements of new Chrysler automobiles from the point of manufacture to receivers in Florida and Georgia. In 1961, Chrysler Corporation diverted the traffic to independent railroad origination at the plant for transportation in rail multi-level cars to railheads in Atlanta, Jacksonville and Miami with

independent motor transportation beyond to ultimate receivers.

There arose the issue whether carriers such as Dixie Transport Company holding authority to transport automobiles in initial service from manufacturing plants could, under that authority, transport the automobiles ex-rail from railheads in the destination states to ultimate receiver. The Commission in a declaratory proceeding said that the authority from the production points did not authorize the transportation from railheads and that appropriate authority from the railheads was required. This declaratory interpretation of the Commission was made in *National Auto. Transporters Ass'n.—Petition for Declaratory Order,* supra.

Dixie filed its petition on January 17, 1963, showing the Commission the diversion and asking that it be granted the new authority to handle the automobiles ex-rail from Atlanta, Jacksonville and Miami to points in Georgia and Florida. Thus, the parallel is shown between the circumstances existing in connection with the so-called "follow the traffic" doctrine. Indeed Dixie sought to follow the traffic in which it had previously participated by seeking new authority to handle the remaining motor carrier portion of the movement irrespective of the carriers who were already appropriately authorized and were then handling the ex-rail traffic.

A procedural method had been prescribed by the Commission in *National Auto. Transporters Ass'n.—Petition for Declaratory Order,* supra. After discussing the transition which had occurred in the automobile transporting industry involving a great

diversion to railroad service from all-motor service, the Commission authorized a procedural method as follows, at 91 MCC 415:

> "A great burden would be placed on applicants, protestants, and this Commission by the filing of individual motor carrier applications for appropriate authority where modifications of existing rights are necessary as a consequence of the interpretation made herein. Under the circumstances presented here, however, the same result may be accomplished by a filing of an appropriate petition to modify existing operating authorities so that the initial carrier may continue to participate in traffic in those instances where initial authority, as here interpreted, does not cover the movement. Such a petition should be filed in the same docket number in which the initial authority has been granted and would be considered in the same light as an application filed under Section 207(a) of the Act."

These appellants were parties to the proceeding, supra, where this procedure was prescribed. In view of the Commission's representation that any petition would be considered in the same light as an application filed under Section 207(a) of the Act, no appellate procedure was instituted upon the assumption that such representation could be relied upon.

These appellants, among other protestants, opposed the request of Dixie Transport Company in its petition, showing that the traffic had been moving effectively via the existing carriers for many months and requesting oral hearing and opportunity to present evidence and cross-examine witnesses on the issues of public convenience and necessity. Irrespective of these protests and requests for opportunity to present

evidence and cross-examine witnesses, the Commission issued a certificate to Dixie to perform the new service from the railheads on ex-rail traffic, in direct competition with these appellants and other existing motor carriers.

Thus, this appeal presents to the Supreme Court the substantial question of the validity of the sole criteria adopted by the Commission, this being the first actual grant of authority by the Commission implementing that criteria.

As shown above, the District Court (Appendix A) just simply failed to come to grips with the real legal issues in this proceeding because of its misconception concerning the factual situation. The effect of the District Court's refusal to enjoin the Commission's grant of authority to Dixie is to affirm a grant of authority upon facts and circumstances identical to the "follow the traffic" doctrine. That doctrine was completely repudiated in the *Smith & Soloman* decisions, supra, and its resurrection under the present variant is contrary to any proper concept of public convenience and necessity under Section 207 of the Interstate Commerce Act.

The validity of this "follow the traffic" doctrine, in any of its variations, presents a substantial question in the administration of Section 207 and the interpretation of public convenience and necessity, in view of the multitude and variety of economic and technological changes constantly taking place in the transportation field and the shippers' desire to take advantage of these situations by shifting their production points and utilizing different transportation combinations to effect savings in freight costs.

Contravention of the National Transportation Policy

There is the directly related and subsidiary question presented by this appeal as to whether the sole criteria devised by the Commission to grant the new certificate, which criteria is identical with the "follow the traffic" doctrine, is in direct contravention of the National Transportation Policy declared by Congress.

Section 207(a) of the Act must, of course, be administered within the framework of and giving due regard to the National Transportation Policy. *Interstate Commerce Commission* v. *Parker*, supra. That policy declared, in part, as follows:

> "It is hereby declared to be the National Transportation Policy of the Congress . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers. . . ." (49 USC preceding §§ 1, 301, 901 and 1001.)

The District Court of New Jersey in *Smith & Soloman*, supra, as well as the Commission itself in its own decision in that case, recognized the importance of the National Transportation Policy in administering Section 207 of the Act. The Court said:

> "By reason of that policy itself the Commission must carefully weigh the entire relevant situation. If after that, a carrier application based on a 'follow the traffic' conception is shown to be reasonably required by public convenience and necessity (which would include proper allowance for other carrier rights and for National Transportation Policy) the 'follow the traffic' principle invoked might well be the determining feature in the decision as to whether the application should be granted."

Thus, this appeal presents the substantial question of the extent to which the "follow the traffic" principle

contravenes the National Transportation Policy, when that principle, or one closely akin or identical thereto, becomes the sole criteria which the Commission devises to base grants of new and additional operating authority. It seems apparent that the District Court for New Jersey was eminently correct in its decision in *Smith & Soloman*, supra, that the Commission must weigh the *entire relevant situation*, and that in weighing the entire relevant situation, the Commission must consider other carriers' rights and the National Transportation Policy, or in other words, the adequacy or inadequacy of existing service.

It is submitted to the Court that the time has now come when there must be a final determination made as to what weight the "follow the traffic" principle can be given under the National Transportation Policy and under Section 207 of the Act upon the determination of public convenience and necessity. In the interest of the national transportation system the Court should determine this question, particularly since the Commission has elected to adopt such principle (or one so closely akin as not to be materially distinguishable) as the sole criteria, without considering the entire relevant situation.

Sufficiency of the Commission's Orders

The proposition that the Commission must carefully weigh the entire relevant situation leads next to the substantial question of whether the Commission's orders meet the minimum requirements of Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)) which provides in part:

> "All decisions . . . shall become part of the record and include a statement of (1) findings and

conclusions, as well as the reason or basis therefor on all the material issues of fact, law or discretion presented on the record; . . ."

It is well settled that Section 8(b) of the Administrative Procedure Act applies to cases involving applications for certificates of public convenience and necessity. *Riss & Co., Inc.* v. *United States,* 341 U.S. 907; *Capital Transit Co.* v. *United States,* 97 F. Supp. 614 (DC-DC).

Of concern here is whether the Commission in its orders has made sufficient explication to enable the parties and a reviewing Court to understand with a fair degree of assurance why the Commission acted as it did and whether it did consider the entire relevant situation. The District Court in its opinion (Appendix A) avoided any determination of this issue.

It is apparent from prior decisions of the Supreme Court that this is a question of substantial importance in determining the validity of administrative decisions. One such case before the Supreme Court of the United States, even prior to the enactment of the Administrative Procedure Act, involved the State of Florida and the members of the railroad commission against the United States of America in which an order of the Interstate Commerce Commission was the subject of the litigation. The specific question involved was the lack of findings in the order to support it. In finding that the portion of the order of the Interstate Commerce Commission under review was not supported by the findings of the Commission, the Supreme Court held as follows:

". . . in order to sustain the statewide order . . . it must appear that there are findings, supported

by the evidence, of the essential facts . . . , which would justify that conclusion.

The question is not merely one of the absence of elaboration or of a suitable complete statement of the grounds of the Commission's determination, to the importance of which this court has recently adverted (Beaumont, S.L. & W.R. Co. v. United States, decided November 24, 1930, 282 U.S. 74, 91 S. Ct. 1), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported." *State of Florida et al.* v. *United States*, 282 U.S. 194, 75 L. Ed. 291.

Manifestly, the orders of the Commission here before this Court do not include any statement of findings and conclusions, nor reasons or basis therefor, on pertinent material issues of fact and law. The Commission issued no decision or opinion in support of its orders and merely stated in its order dated October 7, 1963, of record before the District Court, the ultimate finding "good cause appearing therefor; we find that the present and future public convenience and necessity require that Certificate No. MC-88300, dated October 26, 1939, be modified as set forth."

Therefore, the substantial question exists as to whether the Commission failed to accord due process of law and violated the provisions of the Administrative Procedure Act, supra.

The Appeal Important

As demonstrated herein, there are substantial legal questions raised on this appeal. The District Court did not come to grips with the legal questions; but affirmed the Commission's grant of authority on a misconception of both the factual and legal questions. Unless this appeal is heard by the Supreme Court, there will have been no appellate review of the judgment below. Substantial questions having been shown, this Court should note probable jurisdiction because Congress thought it so important that appellate review be given in an action against the Interstate Commerce Commission that it provided for a direct appeal to this Court, the highest in the land. 28 U.S.C. § 1253.

Unless the judgment of the Court below is reversed, appellant National Trucking Co., who has invested substantial sums and who has since 1961 responded to the needs of the Chrysler Corporation for the transportation of its automobiles from railheads, stands to have its traffic heart cut from its area of operation. Further, appellant The Motor Convoy will be deprived of potential traffic for which it holds the requisite authority, has operating facilities and has invested substantial sums responsive to the public need.

But, more than just the fate of these appellants is at stake. This is just the first instance where the Commission has granted the new and additional operating authority upon the sole criteria of prior participation in traffic in other areas. If the rights of existing carriers are to be ignored, virtually all ex-rail traffic handled by these carriers and all other carriers under existing appropriate authority stands

in jeopardy by the threat of a possible grant of authority to some other carrier who may have in years past moved traffic in all-motor carrier service from the production plant where such traffic is now moving via railroad from the production plant.

WHEREFORE, Appellants pray that this Court note probable jurisdiction, hear this direct appeal on its merits and reverse the judgment of the Court below.

Respectfully submitted,

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APPENDIX

[Filed October 2, 1964]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 8872

THE MOTOR CONVOY, INC., NATIONAL TRUCKING COMPANY, and FLORIDA CONVOY, INC., *Plaintiffs*

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants*

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION and DIXIE TRANSPORT COMPANY, *Intervening Defendants*

Before Bell, Circuit Judge, and Hooper and Morgan, District Judges.

This is an action brought to enjoin, annul and set aside Orders of the Interstate Commerce Commission in Docket No. MC-88300 dated October 7, 1963, January 20, 1964, February 20, 1964 and Certificate of Public Convenience and Necessity No. MC-88300 issued to Dixie Transport Company on March 11, 1964.[1]

Prior to October 15, 1962 Dixie Transport Company held authority from the Interstate Commerce Commission for the interstate transportation of automobiles and trucks from their place of manufacture in Michigan to destinations in Florida and Georgia, excepting certain named counties. Dixie therefore must be classified as an "ini-

[1] Petitioner complains that the Commission issued said certificate without giving opportunity for protestants to introduce evidence in opposition thereto. The material facts in the record are stated below.

tial carrier'' pursuant to Administrative Ruling #75 issued by the Commission in 1938 and providing as follows:

> "The term 'Initial Movements' means transportation of *new motor vehicles* from a place of manufacture or assembly, specifically authorized to be served as a point of origin by the originating carrier's certificate or permit, to any point or place upon the authorized route or within its defined territory for delivery to consignee or to a connecting carrier.
>
> "The term 'Secondary or Subsequent Movements' means transportation of motor vehicles, *except transportation of new motor vehicles from a place of manufacture or assembly,* by a carrier to, from, and between all points and places upon its authorized route or routes or within its authorized territory for delivery to consignee or connecting carriers. Such movements also include cross movements, back hauls, and movements to and from body and speciality plants upon the route or routes or within the authorized territory of the carrier." (Italics supplied)

With the new and modern methods of transporting new automobiles Dixie Transport Company found its revenues were taking a substantial slump. It therefore applied to the Commission for a modification of its certificate so as to entitle petitioner to transport such automobiles only from Atlanta, Georgia and Jacksonville, Florida to the same points in Florida and Georgia as covered by its original certificate, but permitting the shipments from Michigan to Atlanta and Jacksonville to be made by rail by use of "trailer on flat car" (TOFC) service (sometimes referred to as "rail piggy-back" or by "multi-level rail car" (MLRC). The Commission properly took cognizance of the fact that the two methods of transportation just referred to had caused a substantial trend from

motor transportation to rail transportation. It accepted the affidavit from Dixie Transport Company showing that this trend had caused Dixie a substantial loss in income, although Dixie had previously expended considerable sums of money in preparing to exercise its rights under its certificate. The truthfulness of said affidavit was not contraverted in these proceedings.

The Commission did in fact decline to have a hearing upon the question of convenience and necessity in connection with Dixie's proposed transportation of new automoblies from Atlanta and Jacksonville to various dealers in the area involved. This Court fails to find in the record, however, any statement as to the nature of the testimony which protesting carriers desired to introduce before the Commission, nor does this Court find any resume or statement of the same in the briefs filed in this case. This omission will be discussed hereinafter.

The reason why the Commission did not entertain further evidence cannot be understood without a careful reading and study of the Order entered October 15, 1962 in the matter of "National Automobile Transporters Association Petition for Declaratory Order, No. MC-C-3024." That proceeding was brought by National Automobile Transporters Association (NATA) seeking a declaratory order interpreting Administrative Ruling #75 quoted above.

> "and grants of motor carrier operating authority which follow that ruling, particularly insofar as the meaning of the terms 'initial' and 'secondary' movements as used in such authorities are concerned."

NATA is an intervenor in this action and all other parties to this action were also parties before the Commission in the above proceeding, hereinafter referred to as the "NATA proceeding."

In NATA at page 409 the following language appears:

> "The original issue presented by petitioner is whether a motor carrier authorized to handle initial movements of motor vehicles may accept such traffic at an authorized point of manufacture or assembly and, without obtaining additional authority, transport it to any point in its initial movement territory by utilizing rail TOFC service, or any comparable rail service, for some intermediate portion of the movement. If such delivery of an initial-movement shipment to a rail point of service does not constitute an interchange which ends the initial nature of the haul, then the initial hauler would be able to effect substitution, without additional authority to and from the intermediate points."

The same question was elsewhere stated in the following language:

> "This petitioner seeks a ruling as to whether a motor carrier holding initial authority only from A to D may transport the said traffic to B a nonservice point intermediate to D, there load it on a rail flatcar, for handling in trailer-on-flatcar or 'piggyback' service to C, another nonservice point intermediate to D, where it would take possession of the shipment and move it to destination, without first obtaining specific authority either to serve B and C or to operate from C to D."

The undisputed facts in the instant case bring Dixie Transport Company squarely within the above stated circumstances for Dixie was a motor carrier authorized to handle initial movements of motor vehicles from Michigan to Georgia and Florida, it did desire "without obtaining additional authority," to transport the same "to any point in its initial movement territory by utilizing rail TOFC

service or any comparable rail service." The Commission in the NATA case ruled:

> "The use by motor carriers of TOFC substitution permits each mode of transportation to best utilize its inherent qualities to provide shippers and the public generally with an efficient and economical service. This Commission has encouraged such transportation developments in the past, and there is no reason at this point to further question the legality of a method of operation long used by the industry and recognized by the Commission's decisions and regulations."

Having made the above ruling the Commission considered the manner in which it would be implemented in the future and (see M.C.C. 415):

> "A great burden would be placed upon applicants, protestants, and this Commission by the filing of individual motor carrier applications for appropriate authority where modifications of existing rights are necessary as a consequence of the interpretation made herein. Under the circumstances presented here, however, the same result may be accomplished by the filing of appropriate petitions to modify existing operating authorities so that the initial carrier may continue to participate in traffic in those instances where initial authority, as here interpreted, does not cover the movement. Such a petition should be filed in the same docket number in which the initial authority has been granted *and would be considered in the same light as an application filed under section 207(a) of the Act.*" (Emphasis supplied)

Plaintiffs in this action lay great stress upon the italicized language above, contending with great force that the Commission in the Dixie application matter did not consider the same "in the same light as an application filed under

section 207(a) of the act," contending that said section 207(a) requires a full hearing followed by complete Findings of Fact showing convenience and necessity. A strict and literal interpretation would no doubt sustain this contention of the plaintiffs. Viewed, however, in the context of the facts in the record and the entire Order of the Commission in the Dixie application we find such criticism to be unmerited for reasons stated below:

Reduced to its simplest terms the situation is this: Dixie Transport Company had the authority to transport new automobiles from Michigan to all points in Florida and Georgia with the exception of certain named counties. In making such transportation it performed all of the hauling and received all of the revenue, and the protesting carriers received nothing. Dixie's application for modification only sought the right to permit railroads to do a part of its hauling, to-wit, from Michigan to Atlanta and Jacksonville, permitting Dixie to transport the automobiles the rest of the way. The need for the transportation by Dixie had previously been established and Dixie had already been supplying that need, and continued to supply that need just as before with the exception of the substitution of rail carriage in lieu of motor carriage for part of the way.

The status of the complaining carriers would not be affected by the situation aforesaid, for as long as Dixie continued to be selected by the shippers to perform this service they could not obtain it. On the other hand, to deny Dixie the modification sought would mean that Dixie, which had the right to transport the cars all the way, would then be prevented from substitute rail carriage for motor carriage a part of the way, an improved procedure found by the Commission to be decidedly in the public interests.

We are not ruling that the Commission was compelled to grant Dixie's application, but only that it was authorized in so doing, nor do we wish to set an unfortunate

precedent for future applications wherein it might clearly appear there is relevant testimony that should be considered by the Commission.

Counsel will present a judgment in accordance herewith.

This the 2nd day of October, 1964.

s/ GRIFFIN B. BELL
United States Circuit Judge

s/ FRANK A. HOOPER
United States District Judge

s/ LEWIS R. MORGAN
United States District Judge

[Filed Nov. 25, 1964]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 8872

THE MOTOR CONVOY, INC., NATIONAL TRUCKING COMPANY, and FLORIDA CONVOY, INC., *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants*.

Order

On October 2, 1964, this Court filed its opinion in the above-entitled case to the effect that the orders of the Interstate Commerce Commission complained of are valid and lawful in all respects. On or about October 26, 1964, plaintiffs filed a Motion for Rehearing, Reargument and Reconsideration. Replies to that Motion were filed on or about November 3, 1964, by defendants the United States of America and the Interstate Commerce Commission, and on

or about November 7, 1964, by intervening defendant National Automobile Transporters Association.

After considering the above-described Motion and the Replies thereto, this Court has concluded that the opinion dated October 2, 1964, should be amended as hereinafter specified, and that the Motion for rehearing, reargument and reconsideration should be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the opinion of this Court dated October 2, 1964, be, and it is hereby, amended by striking page 5 of the typewritten copy of said opinion and inserting in lieu thereof a new page 5, which shall read as follows:

> "This petitioner seeks a ruling as to whether a motor carrier holding initial authority only from A to D may transport the said traffic to B, a nonservice point intermediate to D, there load it on a rail flatcar, for handling in trailer-on-flatcar or 'piggyback' service to C, another nonservice point intermediate to D, where it would take possession of the shipment and move it to destination, without first obtaining specific authority either to serve B and C or to operate from C to D."

The Commission ruled that a carrier holding initial authority could perform the type of operations described above. As pertinent to the instant case, however, the Commission further ruled (91 M.C.C. at 413):

> "Similarly in those instances where a railroad or, as an example, motor carrier 'A', originates the traffic, motor common carrier 'B' cannot pick up the traffic from the rail unloading point under its initial authority but must possess appropriate secondary authority from the rail unloading point for delivery to ultimate destination. * * * "

The undisputed facts in the instant case bring Dixie Transport Company squarely within the above stated cir-

cumstances for Dixie was a motor carrier authorized to handle initial movements of motor vehicles from Michigan to Georgia and Florida, and it did desire "in those instances where a railroad . . . originates the traffic" to "pick up the traffic from the rail unloading point . . . for delivery to ultimate destination."

The Commission in the NATA case ruled:

> "The use by motor carriers of TOFC substitution permits each mode of transportation to best utilize its inherent qualities to provide shippers and the public generally with an efficient and economical service. This Commission has encouraged such transportation developments in the past, and there is no reason at this point to further question the legality of a method of operation long used by the industry and recognized by the Commission's decisions and regulations."

Having made the above ruling the Commission considered the manner in which it would be implemented in the future and ruled: (see 91 M.C.C. 415):

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all motions for rehearing, reargument and reconsideration be, and they are hereby, denied.

Dated at Atlanta, Georgia, this 24th day of November, 1964.

GRIFFIN B. BELL
Griffin B. Bell
United States Circuit Judge

FRANK A. HOOPER
Frank A. Hooper
United States District Judge

LEWIS R. MORGAN
Lewis R. Morgan
United States District Judge

[Filed Nov. 25, 1964]

Judgment

This Court on October 2, 1964, having entered its opinion to the effect that the orders of the Interstate Commerce Commission complained of are valid and lawful in all respects, and on November 24th, 1964, having entered its order amending the aforesaid opinion and denying all motions for rehearing, reargument and reconsideration,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the injunction prayed for be, and it is hereby, denied, and that the complaint be, and it is hereby dismissed.

Dated at Atlanta, Georgia, this 24th day of November, 1964.

GRIFFIN B. BELL
Griffin B. Bell
United States Circuit Judge

FRANK A. HOOPER
Frank A. Hooper
United States District Judge

LEWIS R. MORGAN
Lewis R. Morgan
United States District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 987

THE MOTOR CONVOY, INC. AND NATIONAL TRUCKING COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing an action brought to set aside an order of the Interstate Commerce Commission.[1] The order granted the petition of Dixie

[1] The Commission's order, Docket No. MC-88300, *Dixie Transport Company, Petition for Modification of Certificate*, October 15, 1963, not reprinted in the jurisdictional statement, is reprinted in the appendix, *infra*, p. 13–15.

Transport Company for a modification of its motor common carrier certificate.

Since October 26, 1939, Dixie Transport has held a certificate authorizing it to transport automobiles and trucks from their places of manufacture in Michigan to destinations in Florida and Georgia, except for certain named counties. In accordance with the Commission's Administrative Ruling No. 75 issued in 1938, Dixie's authority was limited to carrying "initial movements" of automobiles, which were defined as movements of automobiles from manufacturing or assembly plants to destination. "Secondary movements" were defined as all other automobile movements, such as carriage of used, damaged, or repossessed automobiles, or new automobiles moving from places other than manufacturing and assembly plants. These classifications, which applied only to certificates and permits authorizing carriage of motor vehicles, were based upon the then existing pattern of operations among motor carriers transporting automobiles.

The advent in recent years of coordinated motor-rail service—*i.e.*, trailer-on-flat-car service (TOFC) and multilevel rail car service (MLRC)[2]—has resulted in new patterns of distribution of new automobiles

[2] In TOFC service, a demountable highway trailer is placed aboard a railroad flatcar for a portion of the line-haul movement. The complete journey from origin to destination is accomplished partly by motor carrier and partly by rail. In movement by multilevel rail car (a railroad flatcar, equipped with bilevel or trilevel racks, specially designed for the carriage of automobiles), the automobiles ordinarily move by motor carrier to and/or from the origin and destination railheads, and by rail for the line-haul movement.

and trucks. As a consequence, motor carriers that handled initial movements have experienced a sharp decrease in tonnage and revenues.[3] These changes led to the Commission's decision in *National Automobile Transporters Association*, 91 M.C.C. 395 (hereafter *"NATA"*), rendered in response to a petition for declaratory order filed by the Association.[4] The Commission there held that "initial authority", in its historic meaning, restricts a motor carrier to the transportation of automobiles which are picked up by it at the specified points of origin for delivery to the specified destinations described in the certificate. If the traffic moves initially from the point of origin via a railroad, a motor carrier holding "initial authority" between the origin and ultimate destination is not authorized to perform the remaining motor movement from the railhead to the consignee. To participate in such traffic, the motor carrier must obtain appropriate secondary authority. Thus a motor carrier which had previously handled particular automobile traffic in an all-motor movement could not, in such

[3] During the five-year period from 1959 to 1963, the motor carriers' share of new automobile traffic declined from 88 percent to 69.5 percent of the total tonnage; their share of the gross revenue derived from such traffic declined from 83.6 percent to 59.8 percent of the total. *Transport Economics* (monthly comment by Bureau of Transport Economics and Statistics, Interstate Commerce Commission, December 1964) at pp. 1–2.

[4] That proceeding was consolidated with another proceeding initiated by Division 1 of the Commission on its own motion to determine whether Auto Transports Inc. of Oklahoma City had been operating within the terms of its permit by instituting TOFC service.

circumstances, continue to perform the remaining motor portion of a coordinated rail-motor movement of the same traffic.

The Commission also ruled, however, that an affected motor carrier might obtain a modification of its certificate for the limited purpose of permitting it to haul the motor portion of a coordinated rail-motor movement of traffic, which the motor carrier had previously carried over the entire route. This limited modification could be obtained by filing a petition accompanied "by verified statements showing the volume and routing of movements which petitioner transported within a reasonable time prior to the change in movement, and the same data with respect to traffic shipped subsequent to the introduction of rail TOFC and multilevel rail movements" (91 M.C.C. at 415). A modification of the original certificate would be permitted "only to the extent necessary to enable a petitioner to continue to participate in the remaining motor movement, and not to encroach on the rights of other existing carriers" (*id.* at 416).[5]

In the instant case, Dixie Transport, having lost all of its Chrysler traffic because of the initiation of coordinated rail-motor service, had, prior to the

[5] Pursuant to that ruling, a total of eleven applications for modification have been filed with the Commission. Five of those applications have been granted, and six have been denied. Two of the decisions which granted modification have been appealed to a district court, *United Transports* v. *United States* (Civil Action No. 65–118, W.D. Okla.); and *United Transports* v. *United States* (Civil Action No. 65–119, W.D. Okla.). Complaints in both cases were filed on April 8, 1965.

NATA decision, sought to obtain general "secondary authority" authorizing it to handle *all* secondary exrail movements from the railheads at Jacksonville, Florida, and Atlanta, Georgia.[6] The Commission denied these applications on the ground that the public convenience and necessity did not warrant the introduction of an additional general "secondary movement" service. After the *NATA* decision was rendered, Dixie filed a petition pursuant to the procedure therein established. Dixie's accompanying affidavits stated that in 1960 Dixie had transported 19,263 automobiles from the Chrysler plants in Detroit, Michigan, to destinations in Georgia and Florida. This traffic produced revenues of $2,959,536.72, amounting to 70 percent of its total revenues.[7] In 1961 Chrysler ceased shipping this traffic via Dixie and shipped it via multi-level rail car service from Detroit to Atlanta, Georgia, and Jacksonville and Miami, Florida, and by October 1961, Dixie had lost all of its Chrysler traffic. Dixie's petition for a modification requested the limited authority to transport the Chrysler traffic from the railheads in Florida and Georgia to its ultimate destination.

Appellants, motor common carriers having secondary authority to serve the railheads in Florida and Georgia, filed protests and requests for oral hearing. They did not controvert the facts stated in Dixie's

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[6] Docket No. MC–88300 (Sub-No. 23), *Dixie Transport Company Extension—Florida*, decided April 18, 1961; and Docket No. MC–88300 (Sub-No. 27), *Dixie Transport Company Extension—Florida*, decided January 22, 1963. These decisions are not reported in full.

[7] Exhibit I to Petition for Modification.

affidavits accompanying its petition. The Commission denied the requests for oral hearing and granted Dixie's petition, authorizing it to transport automobiles from Atlanta, Jacksonville, and Miami to points in Georgia and Florida, "[r]estricted to traffic originating at Chrysler Corporation plants in Detroit, Mich., and having an immediately prior movement by rail."

A three-judge district court affirmed, holding that the "need for the transportation by Dixie had previously been established and Dixie had already been supplying that need, and continued to supply that need just as before with the exception of the substitution of rail carriage in lieu of motor carriage for part of the way" (J.S. 6a).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by the Court. The Commission's order granting Dixie Transport a modification of its certificate was issued pursuant to the procedure established in *National Automobile Transporters Association*, 91 M.C.C. 395, a proceeding to which appellants and the other motor carriers of automobiles were parties. The order was based upon determinations made by the Commission in that case and upon uncontroverted facts alleged in Dixie's petition. The Commission in no way departed from well settled principles of law in relying upon policy determinations made in a prior proceeding to justify granting modification of a certificate of public convenience and necessity.

The Commission's ruling in *NATA* established a procedure whereby a motor carrier possessing "initial authority" might obtain a modification of its operating authority without litigating all issues that may be contested in a certification proceeding under Section 207(a) of the Interstate Commerce Act.[8] That ruling and procedure were prompted by the necessity of affording expeditious relief to motor carriers that had been injured by the diversion of new automobile traffic to the railroads. In view of the effect of the "radically changed circumstances in the transportation industry" and their effect upon the "public interest and the national transportation policy" and the "burden [that] would be placed upon applicants, protestants, and this Commission by the filing of individual motor carrier applications" (91 M.C.C. 415, 416), by motor carriers seeking additional authority, the Commission provided that modifications could be obtained upon a showing that the "initial authority" carrier was only seeking authority to haul from railroad terminals traffic which it had been accustomed to haul from the point of origin before the diversion to rail.

This procedure, while granting relief to adversely affected "initial authority" carriers, was also spe-

[8] Notwithstanding appellants' contrary suggestion (at J.S. 16), the reference in the *NATA* decision to modifications being viewed "in the same light" as an application under Section 207(a) of the Act was, when read in context, plainly not intended to nullify the very purpose of the *NATA* decision—to create simplified and expeditious procedures for dealing with a particular problem. The Commission expressly noted its hope "that such petitions can be disposed of with a minimum of expense and effort for all concerned, and perhaps without oral hearing." 91 M.C.C. at 416.

cifically designed to avoid injury to competing "secondary authority" carriers having authority to serve those railheads where carriers obtaining modifications would receive the automobiles from the railroads. The initial carrier may receive a modification only "to the extent necessary to enable a petitioner to ontinue to participate in the remaining motor movement, and not to encroach on the rights of other existing carriers * * *" (91 M.C.C. 416). By providing for the protection of other carriers serving the same points, the Commission obviated the necessity of taking evidence on the effects that the new authority would have on such carriers.[9]

In relying upon the procedure and policy announced in *NATA* in granting Dixie's petition, the Commission acted in accord with the decision of this Court in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192. It was there held that an administrative agency may validly determine in a rule-making proceeding certain issues that may be determinative, in part, of whether a license should be issued in any given case. In that case the Federal Communications Commission had promulgated rules which prohibited any party having five broadcasting licenses from acquiring any additional television station licenses.

[9] Whatever injury would occur to "secondary authority" carriers would result only from the loss of MLRC or TOFC traffic temporarily acquired between the time of the diversion to the rails and the acquisition of the new authority by the initial carrier. The Commission's ruling in *NATA* represents its judgment that, except in special circumstances, over-all injury to the auto transport industry would be less by permitting "initial authority" carriers to retain that traffic.

The contention was made that an application could not be denied by the Commission without a full hearing as to whether the denial of a license on the grounds stated in the rules accorded with the public convenience and necessity. The court held that the hearing requirement of that section did not withdraw "from the power of the Commission the rule-making authority necessary for the orderly conduct of its business" (351 U.S. at 202), and hence a license could be denied on the basis of the rules alone.[10] Similarly, in *Federal Power Commission* v. *Texaco,* 377 U.S. 33, 39, this Court recently stated "that the statutory requirement for a hearing under § 7 [of the Natural Gas Act] does not preclude the Commission from particularizing statutory standards through the rule-making process * * *." Cf. *National Broadcasting Co.* v. *United States,* 319 U.S. 190; *Air Lines Pilots Assn., International* v. *Quesada,* 276 F. 2d 892 (C.A. 2); *Bendix Aviation Corp.* v. *Federal Communications Commission,* 272 F. 2d 533 (C.A.D.C.).

Similarly, the ICC took occasion in the *NATA* proceeding to announce in advance, for the benefit of the automobile transportation industry, the policy it intended to follow, and a procedure for effectuating that

[10] The Commission's rules in *Storer* provided that an applicant might seek a waiver of the rules. The court called attention to the necessity of such flexibility, but stated "that a full hearing * * * would not be necessary on all such applications" (351 U.S. at 205). In the instant case the ICC did not foreclose the possibility of a hearing in an appropriate situation: "* * * it may be that such petitions can be disposed of with a minimum of expense and effort for all concerned, and perhaps without oral hearing" (91 M.C.C. at 416).

policy, in acting upon modifications of operating authorities filed by motor carriers that were injured by the effect of coordinated motor-rail transportation. This policy was established pursuant to the Commission's general powers "to make all necessary orders * * * and to prescribe rules, regulations, and procedure" in the administration of the Motor Carrier Act, Section 204(a)(6). Since appellants did not controvert the facts alleged by Dixie as to the nature and extent of traffic which it had formerly hauled and which it sought permission to continue to haul ex-rail, there was no necessity for holding a hearing on the unspecified issues that appellants sought to raise. As the district court stated (J.S. 3a): "This court fails to find in the record, however, any statement as to the nature of the testimony which protesting carriers desired to introduce before the Commission, nor does this Court find any resume or statement of the same in the briefs filed in this case."[11]

The order granting the petition was supported by adequate findings and a sufficient statement of the Commission's rationale. The order specifically refers to the uncontroverted facts alleged in Dixie's petition and the verified statements as to the amount and type of traffic that Dixie had hauled prior to the diversion. The order also places explicit reliance on the *NATA* case and the procedure there estab-

[11] The court made clear, however, that the Commission did have an obligation to afford a hearing when "there is relevant testimony that should be considered by the Commission" (J.S. 7a).

lished. In sum, it makes amply clear the facts and policies upon which the Commission proceeded.

Finally, as the Commission's decision in the NATA case makes clear, the action taken in this case is not inconsistent with the doctrine that new common carrier authority will not ordinarily be granted to permit a carrier to "follow the traffic" of a particular shipper. *Smith & Solomon Trucking Co.* v. *United States,* 120 F. Supp. 277 (D. N.J.), affirming *Smith & Solomon Trucking Co., Extension,* 61 M.C.C. 748. That principle is intended to prevent a disruption of "the existing competitive situation, since the new carrier's operation in such territory cannot be restricted". *Smith & Solomon Trucking Co., Extension, supra,* at 753. In the instant case, however, the modification granted by the Commission expressly restricts Dixie's operations to traffic formerly hauled, so that no additional competition will be experienced by the existing carriers.

The action of the Commission was fully "responsive to the dynamic character of [the] transportation problems" (*Board of Trade of Kansas City* v. *United States,* 314 U.S. 534, 546) resulting from the application of the unique phraseology previously used in automobile carriers' certificates to the new pattern of coordinated motor-rail service. The procedure followed by the Commission is consistent with this Court's admonition in *Federal Power Commission* v. *Hunt,* 376 U.S. 515, 527, that the public interest requires resolution of such problems through procedures which are both fair and efficient. The lower

court correctly held that the Commission "was authorized" (J.S. 6a), in these circumstances, to grant the limited modification of Dixie's certificate; and there is no occasion for further review by this Court.

CONCLUSION

For the foregoing reasons we submit that the judgment of the court below should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
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Interstate Commerce Commission.

APRIL 1965.

APPENDIX

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the — day of ———, A.D. 1963

No. MC–88300

DIXIE TRANSPORT COMPANY

(Whitley City, Ky.)

It appearing, That certificate No. MC–88300 dated October 26, 1939, was issued to petitioner authorizing operation as a common carrier by motor vehicle, in interstate or foreign commerce, of automobiles and trucks from and to the points described in the appendix hereto;

It further appearing, That in its report and order in *National Auto. Transporters Assn.—Declaratory Order, NATA,* 91 M.C.C. 395, (decided October 15, 1962), the Commission, *inter alia,* (a) determined that motor carrier holders of "initial" and "secondary" authority to transport automobiles should be placed in a position to be able to continue to participate in the transportation of certain traffic they enjoyed prior to the advent of trailer-on-flatcar and multilevel rail car service, and (b) outlined a procedure for modifying the certificates and permits of such motor carriers;

Upon consideration of the record in the above-entitled proceeding, and of:

1. Petition of Dixie Transport Company, filed January 17, 1963, for modification of certificate.

2. Reply by National Trucking Company, filed May 13, 1963, protestants, embracing a petition for oral hearing.

3. Reply by Florida Convoy, Inc., protestant, filed May 13, 1963.

4. Petition of Florida Convoy, Inc., protestant, filed May 13, 1963, for oral hearing.

5. Reply by Motor Convoy, Inc., protestant, filed May 17, 1963, embracing a petition for oral hearing.

6. Reply by Dixie Transport Company to "protests" and petitions for oral hearing in (2), (4), and (5) above, filed June 10, 1963.

and good cause appearing therefor:

We find, That the present and future public convenience and necessity require that Certificate No. MC–88300, dated October 26, 1939, be modified as set forth in the following paragraph;

It is ordered, That upon full compliance by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act and the rules of the Commission thereunder Certificate No. MC–88300, dated October 26, 1939, be, and it is hereby modified by adding to the certificate the following:

Automobiles, in secondary movements, in truck-away service: from Atlanta, Ga., and Jacksonville and Miami, Fla., to points in Florida and points in Georgia, except those in Towns, White, Hall, Gwinnett, Rockdale, DeKalb, Clayton, Fayette, Coweta, Heard, Carroll, Douglas, Foulton, Cobb, Forsythe, Dawson, Lumpkin, Union, Fannin, Gilmer, Pickens, Cherokee, Paulding, Haralson, Bartow, Gordon, Murray, Whitfield, Catoosa, Dade, Walker, Chattooga, Floyd, and Henry Counties, Ga.: Restricted to traffic originating at Chrysler Corporation plants at Detroit, Mich., and having an immediately prior movement by rail.

It is further ordered, That in all other respects the petitions in (1), (2), (4), and (5), be, and they are hereby, denied for the reason that no sufficient cause appears (1) for modifying the said certificate except to the extent modified by the first ordering paragraph hereof, or (2) for assigning the matter for oral hearing.

And it is further ordered, That if applicant does not comply with the requirements set forth in the first ordering paragraph, within 60 days from the date of service of this order, or within such additional time as may be authorized by the Commission, the petition of applicant considered and disposed of by this order shall stand denied in its entirety, effective upon the expiration of the said compliance time.

By the Commission, division 1.

HAROLD D. MCCOY, *Secretary.*

(SEAL)

Authority in certificate No. MC–88300, dated October 26, 1939, sought to be modified.

Truckaway: *Automobiles* and *trucks* from Detroit, Pontiac, Flint, and Lansing, Mich., and Southbend and Evansville, Ind., to points and places in Florida and those in Georgia except Towns, White, Hall, Gwinnett, Rockdale, DeKalb, Clayton, Fayette, Coweta, Heard, Carroll, Douglas, Foulton, Cobb, Forsyth, Dawson, Lumpkin, Union, Fannin, Gilmer, Pickens, Cherokee, Paulding, Haralson, Bartow, Gordon, Murray, Whitfield, Catoosa, Dade, Walker, Chattooga, Floyd, and Henry Counties, Ga., with no transportation for compensation in the reverse direction.

Service herein authorized is subject to the condition that applicant shall not also operate as a private carrier of property by motor vehicle in the transportation in interstate commerce of automobiles and trucks.

U.S. GOVERNMENT PRINTING OFFICE : 1955

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In the Supreme Court of the United States

October Term 1964

No. 987

THE MOTOR CONVOY, INC., AND NATIONAL TRUCKING COMPANY,

Appellants,

versus

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION

Appellees

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the intervening appellee, Dixie Transport Company, moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment (J.S. 10a) of a three-judge District Court convened pursuant to 28 U.S.C. 2284 and 2325. Appellants' action below was brought to set aside an Order of the Interstate Commerce Commission[1] which granted the petition of Dixie Transport Com-

[1] *Docket No. MC-88300, Dixie Transport Company, Petition for Modification of Certificate*, October 15, 1963. (Unreported)

pany[2] for modification of its common carrier certificate authorizing the interstate transportation of automobiles. The sole effect of the modification is to prevent Dixie from being wholly deprived of its automobile traffic from Detroit to Georgia and Florida, previously transported by it in all-motor movements, which now moves partly by motor carrier and partly by rail.

Since the inception of federal motor carrier regulation, the Commission has issued certificates authorizing the transportation of automobiles either in "initial movements" or "secondary movements." "Initial movements" are defined as movements of automobiles from manufacturing and assembly plants to destination, while "secondary movements" encompass all other automobiles movements, such as used, damaged or repossessed automobiles, or new automobiles moving from places other than manufacturing and assembly plants (J.S. 1a-2a). This phraseology resulted in unforeseen problems when applied to the coordinated motor-rail service resulting from the advent of TOFC and MLRC.

With the advent, in recent years, of trailer on flat car (TAFC) and multi-level rail cars,[3] Dixie Transport Company, as well as many other automobile motor carriers, suffered extensive loss of traffic which it previously enjoyed.

---

[2] Dixie's Petition was filed pursuant to the procedures previously established by the Commission in *National Automobile Transporters' Association, Petition for Declaratory Order*, 91 M.C.C. 395.

[3] In TOFC service, a demountable highway trailer is placed aboard a railroad flatcar for a portion of the line haul movement, the complete journey from origin to destination being accomplished partly by motor carrier and partly by rail. In movement by multilevel rail car (a railroad flatcar, equipped with bilevel or trilevel racks, specially designed for the carriage of automobiles), the automobiles ordinarily move by motor carrier to and/or from the origin and destination railroads, and by rail for the line-haul movement.

In *National Automobile Transporters' Association, Petition for Declaratory Order*, hereinafter referred to as NATA, 91 MCC 395, the Commission, after conducting extensive hearings, in which the appellants herein participated, concluded that certain motor carriers would, if specified criteria were met, be entitled to modification of their certificates of authority, which would afford such carriers an opportunity to continue to participate in traffic in those instances where authority would not cover the movement. The NATA decision further specified that if an existing authority were modified a petitioner will not be required to relinquish presently held authority, but at the same time the change in existing rights will be limited so as not to place such a petitioner in a position to infringe on the operation of existing carriers.

Pursuant to the procedures set forth in the NATA decision, Dixie Transport Company filed a petition for modification and indicated therein that in 1960, prior to the advent of TOFC and ML RC service, it transported 19,263 automobiles from the Chrysler plants in Detroit to destinations in Florida and Georgia resulting in revenues of $2,959,536.72 (Pet. ex 1). It was demonstrated, by comparing Exhibits I and II of the Dixie Petition, that in 1960 this Chrysler traffic from Detroit amounted to approximately 70% of Dixie's total gross revenue. In 1961, however, Chrysler began to utilize the ML RC service from Detroit to Atlanta, Georgia and Jacksonville and Miami, Florida, with a motor movement only from those railheads to destinations in Georgia and Florida. Since its "initial authority" did not authorize it to perform that remaining motor movement, Dixie had, by October, 1961, lost all of its Chrysler traffic. Dixie, thus, sought a modification of its certificate to enable it to perform the remaining motor

movement of its former Chrysler traffic from Atlanta, Jacksonville and Miami to destinations in Georgia and Florida.

Appellants filed protests and requests for oral hearing, but did not deny the facts set forth by Dixie in its petition and affidavit. The Commission denied the request for oral hearing and modified Dixie's certificate so as to authorize it to transport automobiles in "secondary movements" from the three destination railheads to points in Georgia and Florida, "restricted to traffic originating at Chrysler Corporation plants in Detroit, Mich., and having an immediate prior movement by rail." Dixie's modification was therefore limited to the traffic which it previously enjoyed prior to the advent of TOFC and MLRC.

On appeal the Court below held that the Commission's orders "are valid and lawful in all respects." (J.S. 10a)

ARGUMENT

The National Transportation Policy, 49 U.S.C. preceding §§ *1, 301, 901, and 1001,* provides:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; . . . *all to the end of developing, coordinating, and preserving a national trans-*

portation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. *All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.*" (emphasis supplied)

Intervenor submits that the action of the Commission in modifying Intervenor's Certificate is a proper application of the Commission's responsibility under the National Transportation Policy. It has the effect of "preserving" the national transportation system in that it makes it possible for an established segment of the transportation system to remain in competition for the traffic which it had previously enjoyed over a great number of years. The appellants, on the other hand, seek to retain traffic only recently acquired as the result of the sudden and spectacular changes within the automotive transportation industry and destroy if need be this Intervenor by denying it continued access to its former market.

This appeal presents no substantial question which would warrant consideration by this Court. The Dixie certificate of authority was modified after Dixie had followed the procedure and met the criteria required by the Commission in its NATA decision. The modification to Dixie's certificate is limited in that it merely authorizes Dixie to participate in the remaining motor movement of its former Chrysler traffic and the restriction added to that modification clearly precludes Dixie from instituting a new carrier service in competition with appellants and other existing carriers.

Appellants contend (J.S. 8-10) that the Commission was required to treat Dixie's petition for modification as if it were an application for a new common carrier certificate, including a determination as to whether a new common car-

rier service is needed and required for public convenience and necessity. However, such a requirement was not the intention, we submit, of the Commission in its NATA decision. Dixie's petition to modify did not seek the right to offer a new transportation service to the general public in competition with existing carriers. "The need for the transportation by Dixie (of the Chrysler traffic from Detroit) had previously been established and Dixie had already been supplying that need" (J.S. 6a); the modification merely permits Dixie to continue to supply that need when the same traffic moves in coordinated motor-rail service. The appellants' contentions would have the Court place a construction on the NATA decision which would, in effect, nullify the basic findings and conclusions of the NATA case.

This intervenor respectfully submits that the abbreviated procedure whereby an existing motor carrier may petition for modification of its authority to enable it to remain in competition for traffic previously enjoyed, and only such traffic, is no radical departure, but on the contrary is more restrictive than previously required, adequately protects competing carriers in the secondary movement market, and is well within the discretionary authority of the Commission.

CONCLUSION

The action of the Commission in modifying this intervenor's existing authority represents a proper discharge of the Commission's responsibility of "preserving a national transportation system"; represents a proper exercise of discretionary authority of the Commission; and furnishes adequate safeguards to prevent damage or injury to the appellants from competition of the intervenor other than traffic previously enjoyed by Dixie Transport Company, which traffic is now enjoyed by the appellants as a windfall.

Since this appeal presents no issue warranting plenary consideration, the judgment of the Court below should be affirmed.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
APR 29 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 987

THE MOTOR CONVOY, INC., and
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Appellants,
v.
THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,
Appellees,
NATIONAL AUTOMOBILE TRANSPORTERS
ASSOCIATION,
Intervening Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

MOTION TO AFFIRM, NOTICE THEREOF, BRIEF IN SUPPORT, AND CERTIFICATE OF SERVICE FILED ON BEHALF OF INTERVENING APPELLEE, NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION

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IN THE

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Intervening Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

NOTICE OF HEARING

To All Parties of Record:

Please take notice that the appended Motion to Affirm the Final Order and Judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, entered on November 24, 1964, will be brought on for hearing at the discretion of the United States Supreme Court.

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Detroit, Michigan 48226.

IN THE

Supreme Court of the United States

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Intervening Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

MOTION TO AFFIRM

Comes now, National Automobile Transporters Association of Detroit, Michigan, an Intervening Appellee herein, and moves the Court to affirm the final order and judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, entered on November 24, 1964, from which the appeal in the above-entitled cause purports to have been taken, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. This motion is filed under Supreme Court Rule 16, 1, (c).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

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Intervening Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

BRIEF IN SUPPORT OF MOTION TO AFFIRM

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Intervening Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

BRIEF IN SUPPORT OF MOTION TO AFFIRM

Intervening Appellee, National Automobile Transporters Association, files this its Brief in Support of its Motion to Affirm the Judgment and Order of the three-judge Federal Court, review of which is sought in the proceeding above captioned, and in support thereof respectfully shows:

I. DECISION FOR REVIEW

The final order and judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, entered on November 24, 1964, and here sought

to be reviewed by Appellants, is reported in 235 F. Supp. 250 and a true copy thereof is appended to Appellant's Jurisdictional Statement identified as Appendix "A" thereto.

II. APPELLATE JURISDICTION

The jurisdiction of this Court to review such final order and judgment is acknowledged by this Intervening Appellee.

III. INVOLVED STATUTES

The Federal statutes involved are:

1. The Interstate Commerce Act, 49 USCA 301 (307).
2. The Administrative Procedure Act, 5 USCA 1001 (1007 b).

IV. QUESTION PRESENTED FOR REVIEW

1. Whether the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. This Intervening Appellee says: "Yes!"
2. Whether the three-judge Court committed reversible error in refusing to set aside the orders of the Interstate Commerce Commission in Docket MC-88300 dated October 7, 1963, January 20, 1964, February 20, 1964 and Certificate of Public Convenience and Necessity issued to Dixie Transport Company on March 11, 1964. This Intervening Appellee says, "No!"

V. CONCISE STATEMENT OF THE CASE

On January 17, 1963; Dixie Transport Company filed a Petition with the Interstate Commerce Commission seek-

ing modification of a Certificate of Public Convenience and Necessity issued to it by the Commission on October 26, 1939 in Docket No. MC-88300. The Appellants in the instant litigation filed replies in opposition to the relief requested in such Petition and one of the Appellants, National Trucking Comapny, requested oral hearing on the Petition.

On October 7, 1963, in Docket No. 88300, the Commission entered an Order providing for modification of the Dixie Transport Company certificate and rejecting the request for oral hearing. The Order contained an express finding "That the present and future public convenience and necessity require that certificate No. 88300, dated October 26, 1939, be modified as set forth in the following paragraph;". The latter finding was in turn based upon the observation of the Commission in said Order, as follows:

> "*It further appearing,* that in its Report and Order in *National Auto. Transporters Assn.—Declaratory Order, N.A.T.A.*, 91 MCC 395, (decided October 15, 1962), the Commission, *inter alia,* (a) determined that motor carrier holders of 'initial' and 'secondary' authority to transport automobiles should be placed in a position to be able to continue to participate in the transportation of certain traffic they enjoyed prior to the advent of trailer-on-flatcar and multi-level rail car service, and (b) outlined a procedure for modifying the certificates and permits of such motor carriers;"

Appellants thereupon filed Petitions for Reconsideration, a request for determination and announcement that the proceeding involves an issue of general transportation importance, a request for oral hearing and other relief, to which Dixie Transport Company replied. This Intervening Appellee, National Automobile Transporters Asso-

ciation, filed a Petition for Leave to Intervene embracing a tendered reply to the petitions of the Appellants.

On January 20, 1964, the Commission entered a further order in Docket No. 88300 permitting the Intervening Appellee, National Automobile Transporters Association, to intervene in the cause and accepting the tendered pleadings of National Automobile Transporters Association. All relief prayed for by the Appellants was denied in said order on a number of stated grounds including the following:

> "d. That Protestants have not shown what, if any, evidence will be offered if an oral hearing were held; (e) that the statements and arguments of position by Protestants does not require any different conclusion than that reached in the said order of October 7, 1963; and (f) that it does not appear that an oral hearing is necessary or desirable for a proper disposition of the proceeding;"

On February 20, 1964, the Commission entered a further order in Docket No. MC-88300 denying a Petition for determination and announcement that the proceeding involves an issue of general transportation importance stating "that, in the judgment of the Commission, no issue of general transportation importance is involved". On March 11, 1964, the Certificate of Public Convenience and Necessity modified in conformity with the language of the Commission in its order of October 7, 1963, was issued to Petitioner, Dixie Transport Company, in Docket No. MC-88300.

On April 15, 1964 the Appellants here, together with Florida Convoy, Inc., filed a Complaint in the United States District Court for the Northern District of Georgia, Atlanta Division, against the United States of America and the Interstate Commerce Commission seeking to enjoin, annul, and set aside the foregoing orders of the Commis-

sion together with the modified certificate. The action was docketed as Civil Action No. 8872. The government and the Commission replied and this Intervening Appellee sought and secured permission to intervene and to file its Reply. The issues were briefed and argued in open court and this Intervening Appellee participated both in the briefing and in the oral argument.

On October 2, 1964 the three-judge court entered a judgment upholding the action of the Commission and stating in part "we are not ruling that the Commission was compelled to grant Dixie's application, but only that it was authorized in so doing", etc. On November 24, 1964 the Opinion of the three-judge court was amended. Motion of Appellants for rehearing, re-argument and reconsideration was denied. Notice of Appeal was filed on January 14, 1965.

VI. SUMMARY OF ARGUMENT

The *Motor Carrier Act*, Part II of the *Interstate Commerce Act*, provides certain statutory criteria which must be met before the Interstate Commerce Commission can issue a Certificate of Public Convenience and Necessity. If these criteria are met, the certificate must issue subject to such restrictions or conditions as the Commission, in its discretion, may deem necessary in the public interest either at the time of issuance of the authority or subsequently. If these criteria are not met, no certificate may issue.

The statute is silent, however, as to the procedural criteria for the receipt of evidence upon which the statutory criteria may be met. This is left to the discretion of the Commission and in many instances the Commission issues, or refuses to issue, a Certificate of Public Convenience and

Necessity on facts of record introduced in the form of verified statements and without oral hearing.

In Docket No. MC-C-3024 entitled "*National Automobile Transporters Association—Declaratory Order*", decided on October 15, 1962 and reported in 91 M.C.C. 395, the Commission established a procedure for modification of Certificates of Public Convenience and Necessity on petition of the holder thereof under special circumstances. These circumstances involve any instance in which the holder of a Certificate of Public Convenience and Necessity to transport new automobiles in interstate commerce, but restricted to the movement of such traffic in "initial" movements from point of manufacture or assembly to ultimate destination, was faced with the loss of such traffic by reason of utilization of rail carrier trailer-on-flatcar or multilevel service for a portion of the transportation. The intervention of the rail service in conjunction with motor carrier service would break the continuity of the initial movement and thus require possession and utilization of "secondary" movement authority. The terms "initial" and "secondary" authority were theretofore defined by the Commission's Bureau of Motor Carriers in Administrative Ruling No. 75, and consistently followed thereafter by the Commission.

Dixie Transport Company filed a Petition for modification of its certificate in Docket No. MC-88300 which, in the opinion of the Commission, met the procedural criteria established in *National Automobile Transporters Association—Declaratory Order*, cited *supra*. Appellants in the instant litigation opposed the Dixie Transport Company Petition unsuccessfully and were unsuccessful in securing oral hearing, reconsideration, or a declaration that the issue was one of major transportation importance. So failing, they sought judicial review by Complaint filed in

the United States District Court, Northern District of Georgia, Atlanta Division.

In justifying its action in the Dixie Transport case the Commission found that the Dixie Transport Petition met the procedural criteria established in *National Automobile Transporters Association—Declaratory Order*, cited *supra*, and that the Protestants there, Appellants here, had introduced no evidence in their pleadings refuting any of the facts established by the Dixie Transport Company's sworn petition. In sustaining the Commission's position the three-judge district court made the same finding.

Although participants in the *National Automobile Transporters Association—Declaratory Order* proceeding as Protestants, the Appellants here have not sought judicial review of the latter decision, nor has anyone else. While the instant litigation appears to constitute a direct attack on the Commission's action in the Dixie Transport case, it is in reality a collateral attack upon the procedural criteria established by the Commission in *National Automobile Transporters Association—Declaratory Order* and the appeal should be dismissed.

VII. ARGUMENT

Part II of the *Interstate Commerce Act*, 49 Stat. 543, 49 U.S.C.A. 301-327, establishes the power of the Interstate Commerce Commission to issue Certificates of Public Convenience and Necessity authorizing motor carriers to engage in the transportation of passengers and property in interstate or foreign commerce. The provisions of the Act and, in particular, the provisions of *Section 207(a)*, 49 U.S.C.A. 307(a), established certain statutory criteria to be met before a Certificate of Public Convenience and

Necessity may be issued by the Commission and, where such criteria are met, "a Certificate shall be issued to any qualified applicant therefor".

The Act is silent, however, with respect to the procedure to be employed by the Commission in the receipt of evidence which would tend to prove or disprove that an applicant for a Certificate of Public Convenience and Necessity was a qualified applicant and met the criteria of *Section 207(a)*, namely, the applicant's fitness, willingness, and ability to provide the proposed service in conformity with the provisions of the Act and the regulations of the Commission and the fact that the present or future public convenience and necessity required such certification in whole or in part. Discretion is reposed in the Commission to determine the necessary procedures in its administration of the provisions of the Act.

This Court has given recognition to the discretionary power of the Commission to establish procedural criteria in exercising its discretionary judgment to determine whether an applicant for operating authority has met the statutory requirements of *Section 207(a)*. *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535-36 (1946); *Interstate Commerce Commission v. Parker*, 326 U.S. 60, 65 (1945).

The *Administrative Procedure Act*, 5 U.S.C.A. 1001, imposes no further limitation upon the Commission than the requirement that notice of the filing of an application for a Certificate of Public Convenience and Necessity be given to the general public with an opportunity afforded to interested parties to present their views and evidence in support of their views. Neither statute requires the Commission to hold a public hearing merely because one is requested by an interested party.

Neither the *Administrative Procedure Act* nor the *Interstate Commerce Act* requires the Interstate Commerce Commission to hold an oral hearing where, in the judgment of the Commission, all of the evidentiary facts upon which the issues of law can be determined are capable of presentation in the pleadings. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956). As will be noted hereinafter, there was no factual dispute in the Dixie Transport Company proceeding in Docket No. MC-88300 involving the Commission Orders reviewed by the three-judge District Court whose decision is here sought to be reviewed. There is no evidence of record that the affording of an oral hearing as requested by Appellants would have produced any factual evidence beyond that fully considered by the Commission in its disposition of the Dixie Transport Company Petition for modification of its certificate.

Responsive to a Petition filed with the Commission on June 27, 1960 by this Intervening Appellee, National Automobile Transporters Association, the Commission established certain procedures to be followed by motor carriers of new automobiles seeking modification of their then held operating authorities in order to enable them to coordinate their services with rail carriers in trailer-on-flatcar or multi-level-car service. Upon receipt of the Petition, the Commission gave it Docket No. MC-C-3024, gave public notice of the filing of the Petition, received pleadings and briefs from interested parties, including the Appellants in the instant litigation, held a hearing for the receipt of testimony and documentary evidence, issued a Tentative Report, accepted further responsive pleadings, and ultimately issued its Report and Order in MC-C-3024, entitled "*National Automobile Transporters Association—Declaratory Order*" on October 15, 1962, reported in 91 M.C.C. 395.

Judicial review of the latter decision has never been sought by the Appellants in the instant litigation, nor by anyone else. While some findings of the Commission in the *N.A.T.A.—Declaratory Order* case have been questioned by the Commission in a subsequent decision in *Ex Parte No. 230*, entitled *"Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders"*, decided March 16, 1964, and reported at 322 I.C.C. 301, the latter decision by the Commission is presently under judicial review before a three-judge Federal Court in Fort Worth, Texas and before a three-judge Federal Court in Chicago, Illinois and the Commission has stayed the effective date of its Order. Consequently, for all practical purposes the Commission's decision in MC-C-3024 is final.

In the *National Automobile Transporters Association—Declaratory Order* case, cited *supra*, the Commission found that motor carriers of automobile traffic holding "initial" authority could not transport such traffic from a rail terminus without modification of such operating authority so as to permit "secondary" operating authority within the meaning of those terms as defined in *Administrative Ruling No. 75*, promulgated by the Commission's Bureau of Motor Carriers in 1938 and thereafter followed by the Commission in numerous decisions. The Commission further found that without such modification many carriers were faced with a loss of the traffic which they were then enjoying by reason of the intervention of rail TOFC and tri-level car service; that this would have disastrous economic effects; and that it was in the public interest to permit modification of such certificates in those instances where a carrier could show by petition to the Commission that it had been engaged in the movement of traffic; that it had lost the traffic because of rail intervention and that the traffic was still available for movement by the Applicant in the event of such modification.

This is not the only instance in which the Commission has established procedural criteria for the solving of a particular problem in the transportation of particular commodities by specialized motor carriers. (See *Southern Tank Lines, Extension,* 82 M.C.C 65; 88 M.C.C. 127, 143 (1961).) This Court has recognized the broad authority of the Commission to exercise discretionary judgment in the highly specialized field of motor carriage of automobile traffic in *Alton Railroad Company v. United States,* 315 U.S. 115, 86 L. Ed. 586, 62 S. Ct. 432, stating that the weighing of the evidence "involves in part a judgment based on the characteristics of the highly-specialized transportation service involved * * * that function is peculiarly one for the Commission, not the courts".

Dixie Transport Company's Petition for modification of its certificate in Docket No. MC-88300 met the criteria or procedural methods suggested by the Commission in *National Automobile Transporters Association—Declaratory Order* and a finding to this effect is contained in the Commission's initial Order of October 7, 1963. In reviewing the Commission's action in the Dixie Transport matter, the three-judge Federal Court also recognized the controlling effect of the Commission's findings in the *National Automobile Transporters Association—Declaratory Order,* case as justification for the Commission's action on the Dixie Transport Petition for modification of its certificate.

In disregard of the relative merit of the position of Dixie Transport Company versus the position of the Protestants in the Dixie Transport proceeding, the Appellants here would seek reversal of the Commission's action on the technical contention that the Commission went beyond its statutory authority in granting relief to the Petitioner without adequate findings. However, this Court has found that it is sufficient on judicial review if the findings of the Commis-

sion, considered in composite, express in clear and understanding manner the Commission's conclusion. *Alabama Great Southern Railway Co. v. United States*, 340 U.S. 216, 95 L. Ed. 225, 71 S. Ct. 264.

While it might appear that Appellants in the instant litigation are merely attacking the action of the Interstate Commerce Commission in the Dixie Transport Company Petition and the affirmance of that action by the three-judge District Court, in actuality the Appellants are attacking the procedural criteria established by the Commission in *National Automobile Transporters Association—Declaratory Order* as is evidenced by one of the concluding paragraphs in Appellant's jurisdictional statement appearing on Pages 22 and 23 thereof. Appellants there take the position that all motor carriers holding "secondary" operating authority to transport motor vehicle traffic are in jeopardy if this type of certificate modification by the Commission is allowed to stand. This attempt to secure judicial review of the Commission's decision in the *National Automobile Transporters Association—Declaratory Order* case should be rejected. The decision of the three-judge District Court should be affirmed.

VIII. CONCLUSION

For the reasons indicated, this Intervening Appellee, National Automobile Transporters Association, respectfully prays that its Motion to Affirm the judgment of the three-judge District Court and reported at 235 F. Supp. 250 be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true copies of the foregoing Motion to Affirm, Notice thereof, and Brief in Support of Motion have been served upon all parties of record in this proceeding in accordance with the Rules of Practice of the United States Supreme Court, namely:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 987

THE MOTOR CONVOY, INC. AND
NATIONAL TRUCKING COMPANY, *Appellants*

v.

THE UNITED STATES OF AMERICA
AND
THE INTERSTATE COMMERCE COMMISSION, *Appellees.*

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division

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BRIEF OF APPELLANTS OPPOSING MOTIONS TO AFFIRM

Appellants file this their brief opposing motions to affirm, pursuant to Rule 16 (3) of the Revised Rules of this Court.

STATEMENT

Statement of the case is outlined on pages 4 through 6 of Appellants' Jurisdictional Statement as well as in the motions to affirm and need not be repeated here.

However, one *important* matter should be noted here. The instant case is one of several similar cases involving the same issues in widely scattered sections of the nation where similar action of the Commission is being challenged. In the footnote on page 4 of the Government's motion to affirm it is noted that eleven similar applications for modification have been filed with the Commission, five of which have been granted and six have been denied. Of the five which have been granted, at least four are definitely being challenged. As the Government notes, there are two such cases now on appeal in the United States District Court for the Western District of Oklahoma, *United Transports, Inc.* v. *United States* (Civil Action 65-118, W.D. Okla.) and *United Transports, Inc. and Clark Transport Company* v. *United States* (Civil Action 65-119, W.D. Okla.). The first of these involves a similar grant of authority to Commercial Carriers, Inc. and the second, a simlar grant to Kenosha Auto Transport Corporation. In both of these appeals, the District Court has by order dated April 8, 1965, *restrained the Commission* from making effective its orders until further order of the Court.

In another of the five applications granted by the Commission, *Commercial Carrier, Inc., Modification of Certificate*, Docket No. 43038, Sub No. 415, involving operations on the West Coast, the petition of protestant Convoy Company (dated April 28, 1965) is pending before the Commission for it to find that the

proceeding is one involving an issue of general transportation importance under the Commision's appellate procedures for reconsideration by the entire Commission. In this pending appeal to the entire Commission, protestant Convoy Company seeks that the modification not be finally determined until the Supreme Court has determined the instant case; but that in any event no certificate be issued implementing any modification until Convoy Company has an opportunity to seek relief in Court. Thus, should the Commission refuse to withhold implementation of the modification in that proceeding, an appeal in the District Courts on the West Coast will be brought.

Thus, the instant proceeding involving Dixie Transport Company, the two proceedings pending on appeal in the District Court for the Western District of Oklahoma and the one case still pending before the Commission on appeal on the West Coast accounts for four of the five applications which the Government indicates that the Commission has granted.

It is to be particularly noted that the District Court for the Western District of Oklahoma restrained the Commission from making effective its orders in the two cases, notwithstanding the reported decision of the District Court for the Northern District of Georgia, here on appeal.

The pendency of these various appeals in widely scattered areas of District Court jurisdiction is a particularly impelling factor for the Supreme Court to give plenary consideration to the substantial questions here before the Court.

ARGUMENT

The Government and the intervening appellees argue variously in support of their motions to affirm that the policy determination of the Commission announced in *National Auto. Transporters Association—Declaratory Order*, 91 MCC 395, was a proper procedural device for granting the new and additional operating authority to Dixie Transport Company but nowhere do they show that the Commission has complied with the applicable *statutory standards* requisite to the burden of proof upon an applicant for new authority to show proof of public convenience and necessity for a grant of new operating authority. They have carefully avoided the substantive issue of whether mere prior participation in traffic in another area under different circumstances under the *follow the traffic* theory, heretofore rejected by the Commission and the Courts, is lawful as the *sole criteria* for a finding of public convenience and necessity. They have carefully avoided the substantive facts that existing authorized carriers are meeting the needs of the public and that no shipper actually supports the need for nor indicates an intention to utilize the service authorized by the new certificate issued to Dixie Transport Company.

Certificates May Not Be Modified to Grant New and Additional Operating Authority Except Upon Proof of Public Convenience and Necessity

Section 207(a) of the Interstate Commerce Act (49 U.S.C. 307) is controlling upon the power of the Interstate Commerce Commission to issue certificates of public convenience and necessity and limits this power in the following language:

> "* * * A certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application,

> if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied; * * * "

In the policy determination of the Commission in *National Auto. Transporters Association—Declaratory Order*, supra, the Commission clearly and specifically stated that a petition filed pursuant to the special procedure therein set up would be considered *in the same light as an application filed under Section 207(a) of the Act.* However, in spite of this asserted intention, the Commission actually ignored the requirements of the statute.

Although what we have here is called a modification of a certificate of public convenience and necessity, nonetheless there is involved an actual extension of operating authority and the grant of a new certificate of public convenience and necessity in fact. The very fact that the Commission itself took special note that a petition for modification would be considered in the same light as an application filed under Section 207(a) of the Act affirms that it well recognized that the act to be accomplished was the issuance of a new and additional operating authority not previously held by the carrier. There can be no serious contention but that the Commission granted to Dixie Transport Company a certificate authorizing it to perform the new and additional service which it was not previously authorized to perform. The statute is clear that the Commission is without authority to make such a grant of a new certificate except upon proof of public con-

venience and necessity. Cf. *United States* v. *Drum*, 368 U.S. 370, 373-374 (1962).

In its initial order dated October 7, 1963 (Appendix to the Government's motion to affirm, page 14), the Commission merely stated the ultimate finding "and good cause appearing therefor: We find that the present and future public convenience and necessity require that Certificate No. MC-88300 dated October 26, 1939 be modified as set forth * * *." This is a mere ultimate conclusion by the Commission not supported by the basic or essential findings as required by statute. Cf. *State of Florida, et al.* v. *United States*, 282 U.S. 194.

The "Policy Determination" In National Auto. Transporters Association—Declaratory Order, supra, Is No Lawful Substitute for Proof of Public Convenience and Necessity

In the final analysis the policy determination of the Commission in *National Auto. Transporters Association—Declaratory Order*, supra boils down to an arbitrary policy of the Commission to grant new operating rights such as it did to Dixie Transport Company based solely upon a carrier's prior participation in years past of traffic from a producing plant which no longer moves in motor carrier service from the producing plant. This is in utter disregard of the actual public convenience and necessity for the new operating authority in the new territory.[1] It ignores completely

[1] This is strikingly demonstrated here by the fact that the Commission has *twice* before recently found that Dixie Transport Company has failed to show public convenience and necessity for a similar service in the same area. Docket No. MC-88300 (Sub-No. 23), *Dixie Transport Company Extension—Florida*, decided April 18, 1961; and Docket No. MC-88300 (Sub-No. 27), *Dixie Transport Company Extension—Florida*, decided January 22, 1963; not reported in full.

the existence of carriers already holding appropriate authority to serve the railheads on ex-rail traffic in the new territory. No consideration whatever is given to the adequacy, abundance, or surplus of motor carrier service which may be already authorized to serve the railhead points. No consideration whatever is given to the effect which may result upon a carrier presently authorized to serve the railheads from a grant of the new and additional competition. No effect whatever is given to the needs of shippers for service from the railheads nor to the manner in which the traffic is presently moving from the railheads. None of the matters so firmly entrenched by statue and court decisions as to what constitutes proof of public convenience and necessity are given any consideration. The scheme devised by the Commission is arbitrary, not based upon permissible standards, has no rational basis, fails to accord due process of law, and is unlawful in violation of Section 207(a) of the Interstate Commerce Act and the National Transportation Policy. (49 U.S.C. 307 and preceding 301)

In attempted support of the Commission's reliance upon the *NATA* decision, the Government argues that the Commission acted in accord with certain decisions of this Court, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192; *Federal Power Commission* v. *Texaco*, 377 U.S. 33; and *National Broadcasting Co.* v. *United States*, 319 U.S. 190. It is contended that these cases hold that an administrative agency may validly determine in a rule-making proceeding certain issues that may be determinative, in part, of whether a license should be issued in any given case. Those cases do not support the position of the Government and the facts and circumstances there involved were entirely

dissimilar and distinguishable from those here before the Court.

The *Storer Broadcasting* case, supra, involved the situation where the Federal Communications Commission had, in a rule-making proceeding, determined that in the public interest a television license would not be granted if the applicant had an interest in as many as five existing stations. In all of these cases there was merely involved regulations couched in *prohibitory language.* In the *Storer* case, this Court merely said, at pages 203-4:

> "We think the Multiple Ownership Rules, as adopted, are reconcilable with the Communications Act as a whole. An applicant files his application with knowledge of the Commission's attitude toward concentration of control."

The Court also noted at page 204 that in *National Broadcasting,* supra, similar rules *prohibiting* certain methods of chain broadcasting were upheld and that the *National Broadcasting* case validated numerous regulations couched in the *prohibitory* language of the present regulations.

At page 9 of its argument in support of motion to affirm, the Government says that this Court recently stated in the *Texaco* case, supra, "that the statutory requirements for a hearing under § 7 (of the Natural Gas Act) does not preclude the Commission from particularizing statutory standards through the rule-making process * * *." Most important however, is the fact that this quote taken out of context *leaves out* the most significant part of the quoted sentence. The completed sentence at page 39 is as follows:

> "that the statutory requirement for a hearing under § 7 (of the Natural Gas Act) does not pre-

> clude the Commission from particularizing statutory standards through the rule-making process *and barring at the threshhold those who neither measure up to them nor show reasons why in the public interest the rules should be waived.*" (Emphasis supplied)

Thus, all of the cases relied upon by the Government deal merely with certain *prohibitory* regulations barring those at the threshhold that do not measure up. That is not the situation which is here before this Court. The Court went on to say in *Texaco*, supra at page 45:

> "What the Commission did in these cases, however, is not an 'adjudication' not 'an order' not 'licensing' within the meaning of § 2. (of the Administrative Procedure Act) Whether Pan American can qualify for a certificate of public convenience and necessity has never been reached."

None of these cases support the proposition that the Commission could adopt the positive arbitrary determination that an applicant could qualify for a certificate of public convenience and necessity upon the *sole criteria* of mere prior participation in traffic in another area under different circumstances in complete derogation of well established standards for proof of public convenience and necessity.

The Government cites *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 and *Federal Power Commission* v. *Hunt*, 376 U.S. 515, 527 in support of its argument that the action of the Commission here was fully "responsive to the dynamic character of (the) transportation problems" and that the procedure followed by the Commission is consistent

with this Court's admonition that the public interest requires resolution of such problems through procedures which are both fair and efficient. Neither of these cases support the proposition that the Interstate Commerce Commission may abandon all well established standards for proof of public convenience and necessity and usurp the powers of the Congress by adopting an unlawful criteria and denying due process of law to existing carriers. The *Board of Trade* case, supra, involved a rail grain transit rate adjustment where there was a question of undue or unreasonable discrimination. In dealing with the rate-making process, this Court merely said that Congress has delegated enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. In the *Hunt* case, supra, this Court merely noted at page 527 the "nigh interminate" delay in certain rate proceedings before the Federal Power Commission and admonish that procedures should be developed to avoid such. There are no circumstances of "nigh interminate" delay having any bearing on the Commission's action in this case.

The Commission noted in the *NATA* decision its hope that "such petitions can be disposed of with a minimum of expense and effort for all concerned and perhaps without oral hearing." However laudable this expressed purpose may be, it is no excuse for departing from well established and controlling standards for proof of public convenience and necessity, the denial of due process of law, and ignoring the rights of existing carriers. The issue is not whether from a procedural standpoint the Commission could make a policy determination as such in the prior proceeding;

but, whether that policy determination is actually unlawful. This issue requires plenary consideration by this Court.

Appellants Are Not Collaterally Attacking the NATA Decision

It is variously argued in support of the motions to affirm, particularly by the intervening appellees, that the action of appellants here represents an improper collateral attack upon the policy determination of the Commission in the *NATA* decision. This argument has no merit.

First, it should be noted that the decision of the Commission in the *NATA* case was not actually pursuant to the rule-making procedures under the Administrative Procedure Act. The *NATA* proceeding, as its title clearly shows, was initially a *declaratory order* proceeding involving interpretation of operating rights. The Commission merely used this proceeding as the instrument for announcing its policy to modify existing certificates after it arrived at the conclusion that the carriers holding authority only from the producing plants would be unauthorized to handle shipments from railheads following rail movements.

But more important, there was no occasion for challenging the Commission's expressed policy in *NATA* because by its very terms it indicated that a petition for modification would be considered in the same light as an application under Section 207(a) of the Act. If that policy had been carried out as it was expressed, there would have been no necessity for challenging the lawfulness of that policy. At that time, the Commission had taken no steps to modify any certificates and had not issued the new and additional operating rights which it subsequently undertook to do.

This Court stated in *United States* v. *Storer Broadcasting Co.*, supra, at page 197:

> "Jurisdiction depends upon standing to seek review and upon ripeness. If respondent could not rightfully seek review from the order adopting the challenged regulations it must await action to its disadvantage under them."

Obviously, these appellants neither had standing to seek review nor was review ripe at the time the Commission first made public its policy. The Commission's announced policy was misleading in that it could not have been anticipated at that time that it would take the action which it later took. Appellants challenged that policy at their first opportunity following action to their disadvantage. This is not a collateral attack but is an attack directed against the issuance by the Commission of a new certificate of public convenience and necessity without proof of public convenience and necessity under the established and controlling standards.

The Action of the Commission Is Contrary to the Lower Court's Decision Rejecting the "Follow-the-Traffic" Doctrine

Appellants showed in their Jurisdictional statement, beginning at page 12, that the "follow-the-traffic" doctrine has been squarely rejected as a sole criteria for public convenience and necessity by both the Commission and a lower court in other cases. In *Smith & Soloman Trucking Co.* v. *United States,* 120 F. Supp. 277 (D.C.N.J. 1954), the Court clearly recognized that the primary test under the statute was to determine whether public convenience and necessity required the granting of an application. It held that the Commis-

sion must carefully weigh the *entire relevant situation.* In carefully weighing the *entire relevant situation,* the Commission must consider other carrier's rights and the National Transportation Policy, or in other words, the adequacy or inadequacy of existing service. In disposing of the *Dixie Transport* petition, the Commission gave consideration to none of these matters and certainly did not carefully weigh the *entire relevant situation* as it relates specifically to the service authorized to be performed by Dixie.

The Government argues at page 11 in support of its motion to affirm that the Commission's action in this case is not inconsistent with the doctrine that the Commission's action in this case is not inconsistent with the doctrine that new common carrier authority will not ordinarily be granted to permit a carrier to "follow-the-traffic" of a particular shipper. It is stated that in the instant case the modification granted by the Commission expressly restricts Dixie's operations to traffic formerly hauled, so that no additional competition will be experienced by the existing carriers. This is contrary to fact. This completely ignores the facts of record showing that beginning in 1961 and subsequent thereto appellant National Trucking Company has responded to the shipper's needs under the authority which it has long held for service from the railheads, transporting a substantiality of that traffic and depending upon that traffic to sustain its operations in the face of the loss of other traffic which it previously handled prior to diversion of initial movements from production plants to railroad movements. Similarly, The Motor Convoy, Inc. has stood ready, willing and able to handle any traffic tendered.

The grant of authority to Dixie Transport would permit it to encroach on the rights of existing carriers and would permit it to divert traffic which the existing carriers have handled and upon which they depend for sustenance. The effect upon appellant National Trucking Company from the additional competition and diversion of traffic it is now transporting would be devastating. Here, there is no evidence of any shipper need for additional service and in fact the Chrysler Corporation letter attached to the petition of Dixie Transport Company, while not actually supporting any need on its part for the additional service nor dissatisfaction with present service, on the other hand actually affirms its dependence upon the existing carriers including National Trucking Company for fulfillment of its transportation needs.

The Government argues that by providing "the protection of other carriers serving the same points," the Commission obviated the necessity of taking evidence on the effect that the new authority would have on such carriers. However, the plain fact is that the Commission has provided no protection of other carriers serving the same points but has in fact authorized a new competitive service which threatens to strike at the very heart of the traffic which those carriers serving the same points are depending upon for their existence. In verified statements filed with the Commission with protests to the petition of Dixie Transport Company, the Commission did in fact have evidence before it of the effect that the new authority would have on appellants, but it arbitrarily gave no consideration to those facts.

Clearly, the Commission failed to consider the *entire relevant situation* which the statute and court decisions require that it must consider and its arbitrary grant of new and additional operating authority upon the *sole criteria* of prior participation in traffic in another area under different circumstances is squarely founded upon the so-called "follow-the-traffic" doctrine long rejected by the lower court.

This issue can be properly resolved only by plenary consideration by this Court.

CONCLUSION

Appellants have shown in their Jurisdictional Statement that this appeal presents questions which are so substantial as to require plenary consideration by the Court. This is just one of several cases where similar action of the Commission is being challenged as to its lawfulness. It has been shown that the District Court for the Northern District of Georgia did not come to grips with the real legal issue because of a misconception of the factual situation. There is every indication that the District Court for the Western District of Oklahoma will take a different view of the lawfulness of the Commission's action particularly in view of its having restrained the Commission's action in two cases even in the face of the published decision of the District Court for the Northern District of Georgia here on appeal. The argument in support of motions to affirm by the Government and the intervening appellees does not sustain the lawfulness of the Commission's action.

This Court should deny the motions to affirm, should note probable jurisdiction, hear this direct appeal on its merits and reverse the judgment of the court below.

WHEREFORE, Appellants so pray.

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